

**To be inserted under the existing
undated North Carolina comment to N.C. Gen. Stat. §39-23.4**

SUPPLEMENTAL NORTH CAROLINA COMMENT (2018)

Editor’s Note. - *The North Carolina comment below is the drafters’ comment to the State’s version of the Uniform Voidable Transactions Act (formerly Uniform Fraudulent Transfer Act) as enacted in 2015 and as amended in 2018 by _____ [reference to bill enacted].*

Paragraph 7 of Official Comment 8 to section 4(a)(1) of the Uniform Voidable Transactions Act (the “UVTA”) (codified as N.C. Gen Stat. § 39-23.4(a)(1) of the North Carolina Uniform Voidable Transactions Act, the “NCUVTA”) gives an example of the result that would occur if an individual debtor’s principal residence is in a jurisdiction, such as North Carolina, that has enacted the UVTA but has enacted no legislation permitting an individual to establish a self-settled spendthrift trust (“SST”), and the individual debtor establishes and transfers assets to an SST under laws of a jurisdiction that does have legislation validating the SST.

The Official Comment states that under section 10 of the UVTA (codified as N.C. Gen Stat. § 39-23.9A(a)(1)), the voidable transfer law in the jurisdiction in which the debtor resides, *i.e.*, North Carolina in the example, would apply to the transfer, and if that jurisdiction [North Carolina] follows the “historical interpretation” referred to in Official Comment 2 to this section 4, the transfer would be voidable under section 4(a)(1) of the UVTA in force in that jurisdiction [North Carolina].

N.C. Gen. Stat. § 39-23.4(a)(1), like section 4(a)(1) of the UVTA, requires that, in order for a transfer to an SST to be voided, the creditor must show by a preponderance of the evidence that the transfer was made with the “intent to hinder, delay, or defraud any creditor of the debtor.” In enacting the NCUVTA, the General Assembly carried forward N.C. Gen. Stat. § 39-23.4(b)(13) from the former North Carolina Uniform Fraudulent Transfer Act. This provision, which was not a part of the UVTA, provides as one of the non-exclusive factors for the court to consider in determining intent under N.C. Gen. Stat. § 39-23.4(a)(1), whether “the debtor transferred the assets in the course of legitimate estate or tax planning.” Since the enactment of that provision in 1997, there has been no reported case that has cited that subsection or discussed its meaning.

N.C. Gen. Stat. § 39-23.4(d) was enacted in 2018 to confirm that the “historical interpretation” referred to and discussed in Official Comment 2 (which some have claimed means that a transfer by an individual debtor of assets to an SST is voidable *per se*) is not an accurate statement of the law of this State with respect to a transfer made “in the course of legitimate estate or tax planning.” A transfer to an SST in the course of legitimate estate or tax planning is not *per se* voidable solely on account of such transfer. Likewise, the fact that a transfer was made in the course of legitimate estate or tax planning is not the sole factor to be considered in determining the debtor’s intent, and a transfer to an SST may nonetheless be voidable taking into account other factors, including the other factors listed in subsection (b), in determining intent under subdivision (a)(1).

N.C. Gen. Stat. § 39-23.4(d) is not intended to imply in any way that the “historical interpretation” referred to the Official Comment 2 may or may not apply to a transfer of assets to

an SST not in the course of legitimate estate or tax planning. As of the date of adoption of this comment, there are no reported North Carolina decisions considering this issue.